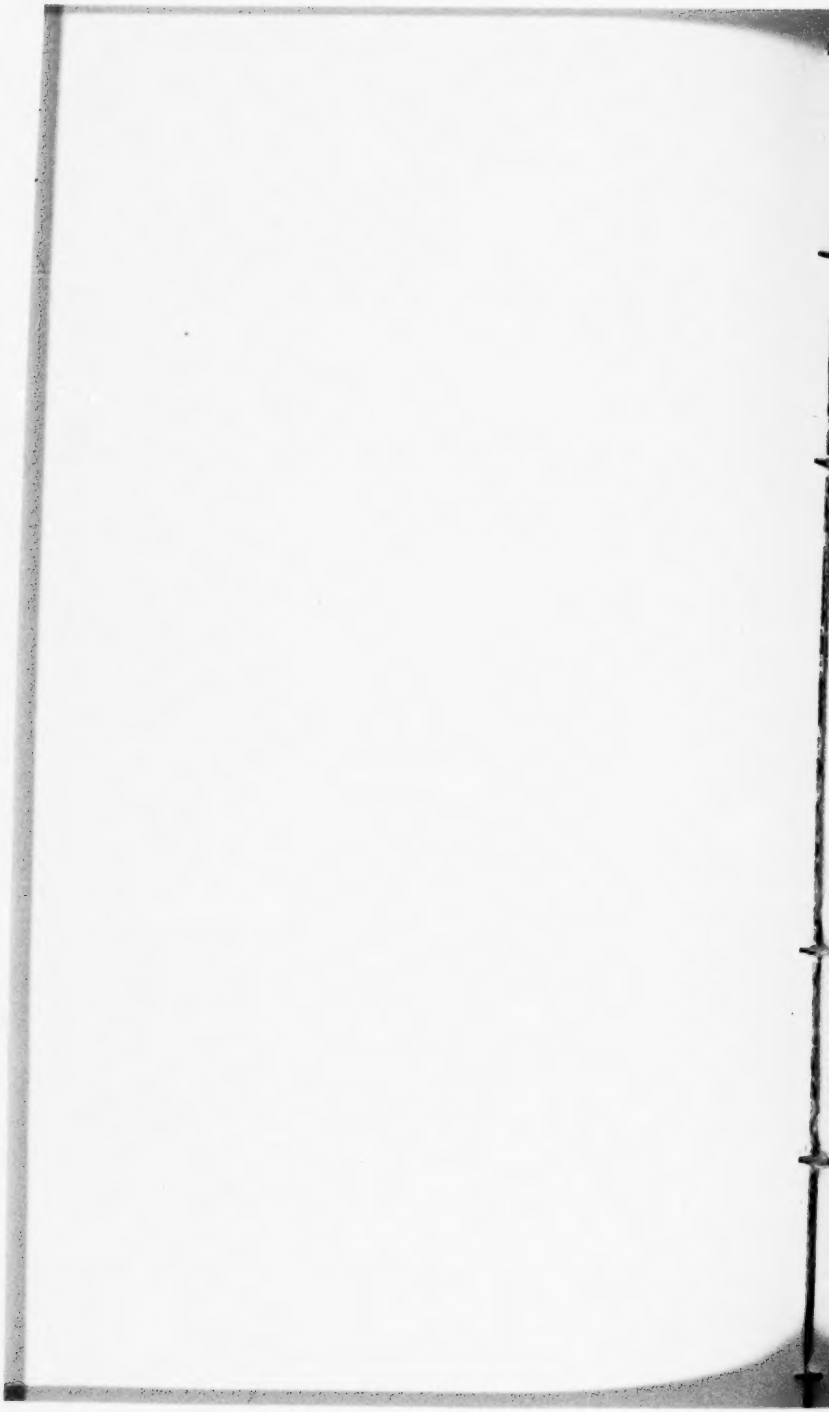


Office Supreme Court U.S.
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No. 303.

Reply Brf. of Blodgett, Kretzinger & Field for Appellee

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1898.

Filed Feb. 18 1899.

No. 303.

CHARLES E. POPE, RECEIVER,

Appellant,

vs.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,

Appellee.

Appeal from the Circuit Court of Appeals for the Seventh Circuit.

Reply to Appellant's Brief Against Appellee's Motion to Dismiss Appeal.

HENRY W. BLODGETT,
G. W. KRETZINGER,
E. C. FIELD,

FOR APPELLEE.

BARNARD & MILLER PRINT, CHICAGO.

Note: We suggested in a note at the foot of our motion to dismiss this appeal that the record covers over three thousand printed pages, and therefore disposition of this motion before hearing would save much expense, labor of counsel and of this court. In addition we respectfully submit that if this court is without jurisdiction appellee ought not to be put to the expense of preparation for hearing on the merits when the same cannot be determined by this court.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

CHARLES E. POPE, RECEIVER, *Appellant,* *vs.* LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY, *Appellee.*	Appeal from the Circuit Court of Appeals, Seventh Circuit.

Reply to Appellant's Brief Against Appellee's Motion to Dismiss Appeal.

Here, the Pettit suits, as shown in former brief, in which appellant was appointed receiver, depended exclusively for federal jurisdiction upon diversity of citizenship, and that this suit brought by appellant as such receiver was ancillary to such original suits.

Counsel for appellant broadly asserts against our motion to dismiss this appeal that the orders appointing appellant receiver in the two Pettit suits, created him a federal officer under United States law, that such orders by their mere entry became equivalent to the laws of the United States within the meaning of the constitution. The soundness of this contention was denied by this court in *Provident Saving Society* v. *Ford*, 114 U. S., page 641. In that case suit was brought in the state court on a judgment rendered in the federal court, and a

removal to the federal court was attempted upon the ground that the judgment, the basis of the suit, was equivalent to an act of Congress, and therefore presented a federal question depending upon the laws of the United States for determination. But this court said:

> "It is suggested, however, that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States; and hence that such a suit is removable under the act of March 3, 1875. * * *
>
> "What is a judgment but a security of record showing a debt due from one person to another? * * * It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States.
>
> "These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of a United States court, and that of a suit by or against a United States corporation."

Thereupon this court held in that case that suit upon a federal judgment presented no federal question, unless the enforcement of the judgment, or its validity, depended upon an act of Congress or some provision of the federal constitution. This decision has not been modified by any case cited or quoted by counsel, and we submit, it is conclusive of this question in favor of our motion.

If a final judgment of a federal court, as held in that case, does not constitute a federal law—is not equivalent

to an act of Congress within the meaning of the constitution, how can a mere *interlocutory order* appointing a receiver be held equivalent to a constitutional provision or an act of Congress?

Courts do not make laws. They expound—construe them.

This interlocutory order might be vacated and set aside at any time by the court entering it, and upon the motion of the court itself.

Appellant was not appointed receiver under any federal statute. He was *not* appointed receiver of a federal corporation. He is a mere chancery receiver of an Illinois corporation, appointed by a federal equity court in the exercise of its general chancery powers derived, *not* from any act of Congress, but from the powers exercised by English chancery courts.

Counsel cite and rely with apparent confidence upon *Cook* v. *Avery*, 147 U. S., 380. In that case Avery alleged that both he and defendant Cook deraigned title through one Payne; that Payne conveyed to the defendant by deed in 1886, while the plaintiff, Avery, claimed title under execution and sale upon a judgment recovered against Payne four years before Cook obtained his deed. The plaintiff further alleged that by reason of certain laws of the United States, and rules of the Circuit Court of the United States (specifically referring to them), the judgment was a lien upon the real estate from the date of its rendition and continued to be a lien up to the date of the sale by the marshal, and by reason whereof the plaintiff had a superior title. The defendant denied that the judgment was ever a valid lien upon the land under the laws of the United States and rules of the Circuit

Court, "and this constituted the controlling question in the case, and upon which the plaintiff's title depended."

The court, after reviewing the statutes of both the state and the United States on the subject, and the rules of the United States Court, concludes as follows:

> "The plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turns upon the existence of a lien, which he asserted and the defendants denied. The disposition of this issue *depended upon the laws of the United States* and the *rules of the Circuit Court*, and their construction and application were directly involved. We are of the opinion that jurisdiction as resting upon the subject-matter was properly invoked."

Here, no federal law and no question involving the effect of a federal judgment depending for its lien upon a construction of an act of Congress are involved.

II.

Counsel assert that appellant as such receiver derived his title through his order of appointment and through the assignment made by the South Atlantic Company, an Illinois corporation, pursuant to such order. But appellant did not aver that his cause of action originated or depended upon his order of appointment or these assignments. On the contrary, he stepped into the shoes of the South Atlantic as its receiver and asserted the right to recover in its name and stead as its receiver, by virtue of certain transactions between it—an Illinois corporation, and the Delphi company,—an Indiana corporation.

In *Provident Sav. Society* v. *Ford*, *supra*, this court said:

> "If A brings an action against B, trover or otherwise, for the withholding of such securities," (United States bonds) "it is not therefore a cause arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, * * * it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced."

Appellant averred in his amended bill:

"The Chicago & South Atlantic Railroad Company continued the work of constructing said railroad so agreed to be built, in good faith, and while so engaged * * * some real or pretended stockholders of said Indianapolis, Delphi & Chicago Railroad Company entered into a scheme whereby, conniving together, and fraudulently and falsely pretending that said Chicago & South Atlantic Railroad Company had ceased doing work on said road so agreed to be built, and had abandoned the same, and had thereby forfeited its rights under said agreements, and declared the same null and void, and under said fraudulent scheme, and false and fraudulent pretense and claim *seized* upon and *took* possession of a part of said road." (Short record, page 12.)

And prayed for relief, among other things:

"Your orator prays that whichever of said defendants" (Indiana and Illinois corporations) "may be found to have taken possession of and to be in possession of said railroad and the effects and property of said Chicago & South Atlantic Railroad Company" (an Illinois corporation) "so unlawfully and

fraudulently seized and occupied as aforesaid, may be decreed to be a trustee for said last named company and for your orator as receiver thereof, and that the title thereof be decreed to be in said last named company and for your orator as such receiver." (Short record, page 21.)

Appellant thus alleges dispossession of an Illinois corporation, the Chicago & South Atlantic, by other state corporations, and prays that the defendants now holding possession may answer for the same to the Chicago & South Atlantic Company or to appellant as its receiver and in its place and stead.

Now, under this averment, is it possible that a mere interlocutory order appointing a receiver presents a federal question—becomes in effect a law of the United States within the meaning of the Constitution in a degree sufficient to furnish federal jurisdiction in a suit brought by such receiver to dispossess defendants of property which neither originated under a federal law, and is neither held or claimed by a federal corporation. Yet, as held in the case last cited, the assertion of rights against a trespasser of land held under a United States patent presents no federal question—does not involve a law of the United States within the meaning of the Constitution.

III.

But appellant was not denied any right claimed by him by virtue of his orders of appointment or his deeds of assignment. On the contrary, the decree of the Circuit Court and the decision of the Circuit Court of Appeals dealt solely and alone with the alleged rights of the Illinois South Atlantic Company against Indiana corporations.

Counsel recite at page 8, from the amendments to appellant's amended bill filed by leave of court, after the entry of the final decree by the Circuit Court. In that amendment appellant avers:

"And the said *defendants*, or some of them, sometimes pretend that this court, in the said suit of John B. Pettit never had any jurisdiction of the subject-matter of said controversy, or of the person of the said Chicago & South Atlantic Railroad Company, to appoint your orator as receiver as aforesaid," and contends that a federal question is presented by this averment.

We submit that the averment is of something that "the defendants, or some of them, sometimes pretend," etc., which was expressly condemned by this court in *Tenn.* v. *Bank*, 152 U. S., 454, where it was averred that "complainants further stated that the defendants claimed," etc., that the revenue law of the state was void, because in violation of the clause of the constitution which forbids the state to pass any laws impairing the obligation of contracts. This court held:

> "The only reference to the constitution or laws of the United States is the suggestion that the *defendants* will contend that the law of the State, under which the complainants claim is void, because in contravention of the constitution of the United States; and by the settled law of this court a *suggestion* of one party that the other will or may set up a claim under the constitution or laws of the United States, does not make the suit one arising under the constitution or those laws."

IV.

Counsel assert under Point III, page 12, that appellant, as receiver, "is an officer of the Federal Court appointing him," and cite cases:

(*a.*) Defining the office and character of receivers of national banks under the banking act.

(*b.*) Receivers of federal railroad companies.

(*c.*) Cases against marshals of the United States, etc., and insist that such cases control the legal status of appellant, and make him a federal officer under United States laws within the meaning of the constitution.

Counsel rely with apparent confidence upon *Tex. & Pac. v. Cox*, 145 U. S., 593, as a decision supporting their assumption of law that the mere order of court appointing appellant receiver, created him an officer of the United States, under its constitution and laws. They say and quote (Appellant's Brief, page 13):

> "The orders appointing plaintiff receiver and authorizing him to bring this suit, 'were entered and all action of the court in the premises taken by virtue of judicial power possessed and exercised under the constitution and laws of the United States.'"

In that case the suit was brought by an injured party against the receiver of the Texas & Pacific Railway Compsna, and it appeared that the plaintiff aud one of the defendants were both residents of the State of Texas, where the suit was brought. The jurisdiction was challenged by the receiver on the ground that there was no diversity of citizenship, but the court disposed of the question, as follows:

> "The Texas & Pacific Railway Company is a cor-

poration deriving its corporate powers from acts of Congress, and was held in Pacific Railway removal cases, 115 U. S., 1, to be entitled, under the act of March 3, 1875, to have suits brought against it in the state courts removed to the Circuits Courts of the United States on the ground that they were suits arising under the laws of the United States. The reasoning was that this must be so since the company derived its powers, functions and duties from those acts, and suits against it necesssarily involved the exercise of those powers, functions and duties as an original ingredient."

That case, therefore, stands on the same footing as the other cases cited by counsel, where receivers of national banks were appointed under the national banking act, and where it is said by this court, "receivers of national banks, as plaintiffs, have always been held to be officers of the United States suing under authority of act of Congress."

Observe in that case the receiver had actual possession of the road, and was operating it under the orders of the court. The powers he exercised in such operation were derived from the act of Congress which constituted the charter of the Texas & Pacific. The order of the court appointing him simply authorized him to exercise those powers in the operation of the road. Thus he stepped into the shoes of a federal corporation. Here appellant never came into possession of the property described in his amended bill. The same was at all times in the actual possession and control of the defendants, Illinois and Indiana corporations, to which they asserted title of record. (See opinion Court of Appeals, short Rec., 87.) So none of the property in controversy ever passed within the jurisdiction of the court through the possession of the receiver. All appellant, as receiver, possessed was the

contracts mentioned in his amended bill of complaint, and through which (not upon his orders of appointment) he asserted the right to recover on behalf of the South Atlantic Company, an Illinois corporation, for an alleged seizure and taking from its possession, etc.

That case, or any of the class of cases cited by counsel for appellant, gives no support whatever to the proposition that a mere order appointing a receiver on a creditor's bill makes him a federal officer acting under the constitution and laws of the United States.

Gibson v. *Peters*, 150 U. S., 342, was brought to this court on error to the Circuit Court of the Eastern District of Virginia. The suit was brought by the United States District attorney against the receiver of a national bank to recover for legal services. In its opinion this court referred to Sec. 380 of the Revised Statutes of the United States, providing that all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents are parties shall be conducted by the district attorneys of the several districts under the direction and supervision of the solicitor of the treasury. This court held:

> "The suit brought against McDonald was one arising out of the provisions of an act of Congress governing such associations, and the receiver in whose name it was instituted was an officer and agent of the United States within the meaning of the above section."

In *Brown* v. *Smith*, 88 Fed. Rep., 565, the receiver of a national bank brought suit to recover an assessment upon the shares therein held by the defendant. Held:

> "Sec. 629 of the revised Statutes, concerning the jurisdiction of the Circuit Courts, was divided

into twenty paragraphs, the subjects of but few of which were carried into the act of 1875, to determine the jurisdiction of the Circuit Courts and regulate the removal of causes from state courts. Among the subjects left were suits by officers of the United States suing under authority of any act of Congress, and suits by or against national banking associations. Receivers of national banks, as plaintiffs, had always been held to be officers of the United States suing under authority of acts of Congress."

Here the act of Congress in express terms makes the receiver of a national bank a federal officer, and authorizes him as such to sue for and on behalf of the national bank in his own name.

Kennedy v. *Gibson*, 8 Wall., 503.

Thus, the appointment of receivers of national banks — federal corporations — is expressly provided for in the very act of Congress creating such banks. This act in express terms vests in such receiver the title to all of the property held by the insolvent bank, and his duties in winding up the affairs of the federal insolvent are specifically detailed, and he is made responsible and subject to the supervision of the Comptroller of the Currency.

Here, appellant was appointed a mere chancery receiver by an interlocutory order by a federal equity court in the exercise of its general equity power, and in the absence of any congressional legislation authorizing the same. If such an interlocutory order constitutes the chancery receiver appointed thereby a federal officer — a creature of the United States laws, and clothes him with the equivalent character and functions of a national bank receiver — it can only be upon the sole ground that such an interlocutory order is equivalent to an act of Congress, the national banking act.

Feibleman v. *Packard*, 109 U. S., cited by counsel, is expressly shown to have arisen under an act of Congress. There the suit was brought in the state court against a United States marshal and the sureties on his bond. A petition was filed by the defendants for the removal of the cause, which was refused by the state court. They thereupon filed their petition in the United States Court for a writ of *certiorari* to remove the cause to that court, which was granted. Final judgment was had for the defendants, and the cause was taken to the Supreme Court of the United States on writ of error. The court says:

> "The action, as we have seen, was founded on the official bond of the marshal. The bond was required to be given by Sec. 783, Rev. Stat., and Sec. 784 expressly gives the right of action." The suit "was plainly upon the bond itself, and therefore arose directly under the provisions of an act of Congress."

It is clear that all the cases cited by counsel involving national bank receivers, receivers of corporations created under federal law, and marshals of the United States, have no application *whatever*.

V.

Counsel cite cases brought to this court on error from state courts of final review. No provision was made in the act of Congress for the review of this class of cases by the Circuit Court of Appeals. On the contrary, the Circuit Court of Appeals Act, (last clause of Sec. 5) provides that "nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for a review of such cases."

In *McNulta* v. *Lochridge*, 141 U. S., page 331, it is evident from the opinion of this court that it would have dismissed the writ of error in the absence of Rev. Stat., Sec., 709, which was left unaffected by the Circuit Court of Appeals Act. This court said:

> "But while we think that plaintiff in error is not entitled to immunity by virtue of the statute of 1887, we are authorized by the Rev. Stat., Sec. 709, to review the final judgment or decree of a state court where 'any right, title, privilege or immunity is claimed under any authority exercised under the United States, and the decision is against such title, specially set up or claimed by either party under such authority," etc.
>
> "Now, as McNulta was exercising an authority as receiver under an order of the Federal Court, and claimed immunity as such receiver from suit without the previous leave of such court, and the decision was adverse to such claim, he is entitled to a review of such ruling, whether his claim be founded upon the statute or upon principles of general jurisprudence."

Therefore, it conclusively follows from this holding:

(*a.*) That jurisdiction in that case was taken by this court under Sec. 709, and not by appeal under the Circuit Court of Appeals Act.

(*b.*) That the jurisdiction of this court to review that case, depended exclusively upon McNulta claiming that he was denied an immunity by the state court, *namely*, relief from a suit brought against him as receiver for the liability of his predecessor without leave of court.

Here, appellant was not sued, but brought suit; he was not denied the right to bring and prosecute the suit, but was authorized so to do by the Federal Court appointing him. The order appointing him vested no title in

him, but simply authorized him to recover anything that rightfully belonged to the South Atlantic, an Illinois corporation, for whom he was appointed receiver, for the benefit of the creditors in the Pettit suits.

We respectfully submit the motion in our former brief and this reply.

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For Appellee.